92-691

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

HATTIE E. ROBINSON AND LAMAR GLOVER,

Petitioners,

vs.

GEORGIA DEPARTMENT OF TRANSPORTATION,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Eleventh Amendment immunize Georgia's politically autonomous, fiscally independent Department of Transportation from suit by Georgia citizens over federal constitutional claims in federal court?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 10

I. The Constitutional Issue Is Important 10

II. The Court of Appeals' Decision Conflicts in Principle with the Fifth Circuit's Application of Eleventh Amendment Doctrine to State-Created Entities with Fiscal Independence 12

CONCLUSION 14

APPENDIX –

Appendix I – Judgment of United States Court of Appeals for the Eleventh Circuit entered July 20, 1992 ..... App. 1

Appendix II – *Robinson v. Georgia Department of Transportation,* 966 F.2d 637 (11th Cir. 1992) ..App. 3

Appendix III – Order of the District Court entered July 11, 1991 ..... App. 11

Appendix IV – Order of the District Court entered January 3, 1991 ..... App. 15

Appendix V – October 19, 1978 Internal Memorandum of GDOT Employee James D. Mathis Re: Possible Cemetery Site ..... App. 17

Appendix VI – Pertinent Georgia Constitutional Provisions and statutes ..... App. 20

TABLE OF AUTHORITIES

Page

CASES

Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985) 11

Birdine v. Moreland, 579 F.Supp. 412 (N.D. Ga. 1983) 8

Chisholm v. Georgia, 2 Dall. 419, 1 L.Ed. 440 (1793) 10

Florida Dept. of Health & Rehab. Servs. v. Florida Nursing Home Ass'n., 450 U.S. 147 (1981) 10

Hans v. Louisiana, 134 U.S. 1 (1890) 9, 10, 11, 12

McDonald v. Board of Mississippi Levee Comm'rs, 832 F.2d 901 (5th Cir. 1987) 12, 13

Papasan v. Allain, 478 U.S. 265 (1986) 11

Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) 11

Robinson v. Department of Trans. (Robinson I), 185 Ga. App. 597, 364 S.E.2d 884 (1988) 8

Robinson v. Department of Trans. (Robinson II), 195 Ga. App. 594, 394 S.E.2d 590 (1990) 8

Walker v. Georgia Power Co., 177 Ga. App. 493, 339 S.E.2d 728 (1986) 3

CONSTITUTIONS

Ga. Const. art. 3, § 9, ¶6(b) 5

Ga. Const. art. 4, § 4, ¶1 3

TABLE OF AUTHORITIES – Continued

Page

STATUTES

O.C.G.A. § 32-2-2(a)(2) 5

O.C.G.A. § 32-2-2(a)(8) 4

O.C.G.A. § 32-2-41(a) 4

O.C.G.A. § 32-2-41(b)(1) 4

O.C.G.A. § 32-2-5 4

O.C.G.A. § 32-3-5(a)(2) 7

O.C.G.A. § 32-3-5(a)(4) 7

O.C.G.A. § 32-3-5(a)(5) 7

OTHER AUTHORITIES

Amar, *Of Sovereignty And Federalism*, 96 Yale L.J. 1425 (1987) 11

Fletcher, *A Historical Interpretation Of The Eleventh Amendment: A Narrow Construction Of An Affirmative Grant Of Jurisdiction Rather Than A Prohibition Against Jurisdiction*, 35 Stan. L. Rev. 1033 (1983) 11

Gibbons, *The Eleventh Amendment And State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889 (1983) 11

Nowack, *The Scope Of Congressional Power To Create Causes Of Action Against State Governments And The History Of The Eleventh And Fourteenth Amendments*, 75 Colum. L. Rev. 1413 (1975) 11

Tribe, *Intergovernmental Immunities In Litigation, Taxation, And Regulation: Separation Of Powers Issues And Controversies About Federalism*, 89 Harv. L. Rev. 682 (1976) 12

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GEORGIA DEPARTMENT OF TRANSPORTATION,

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners Hattie E. Robinson and Lamar Glover respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Judgment of the Court of Appeals is reprinted as Appendix I. The opinion of the Court of Appeals is reported at 966 F.2d 637 and is reprinted as Appendix II

to this Petition. The Order of the District Court is reprinted as Appendix III.

JURISDICTION

The judgment of the Court of Appeals was entered on July 20, 1992. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Eleventh Amendment to the United States Constitution which provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

STATEMENT OF THE CASE

1. Statement of the Facts

Gilbert Cemetery lies south of downtown Atlanta at the present-day intersection of I-75 and Cleveland Avenue. In the mid-1800's, the owner of the surrounding land (J.S. Gilbert) set aside a one acre plot as a burial site for his slaves. Thereafter, as slavery ended in Georgia (and the custom of racially segregated burial grounds continued), black families from the surrounding community

continued to bury their dead in Gilbert Cemetery. Burials continued there into the 1950's.

Mrs. Robinson and Mr. Glover are citizens and residents of the State of Georgia and of the United States. Mrs. Robinson's grandmother (Hattie Blake), grandfather (Rev. James Blake), and aunt (Pearl Blake Walker) are buried in Gilbert Cemetery. Mr. Glover's grandfather (Dave Glover) and brother (Young Glover) are buried in Gilbert Cemetery. Under Georgia law, Mrs. Robinson and Mr. Glover owned rights of easement in the real property where Gilbert Cemetery lay. These burial easements are compensable interests in real property under Georgia law.[1]

The Georgia Department of Transportation ("GDOT") is a public entity under the control of the State Transportation Board, a body created by the Georgia Constitution.[2] The Transportation Board is by design politically

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[1] *Walker v. Georgia Power Co.*, 177 Ga. App. 493, 339 S.E.2d 728 (1986).

[2] Ga. Const. art. 4, § 4, ¶1 provides:

> (a) There shall be a State Transportation Board composed of as many members as there are congressional districts in the state. The member of the board from each congressional district shall be elected by a majority vote of the members of the House of Representatives and Senate whose respective districts are embraced or partly embraced within such congressional district meeting in caucus. The members of the board in office on June 30, 1983, shall serve out the remainder of their respective terms. The General

independent of the executive and legislative branches of the State of Georgia.[3] The Board is composed by state constitutional mandate of local representatives from each of Georgia's ten federal congressional districts.

The Board selects GDOT's Commissioner, who autonomously runs GDOT. He reports to the Board, not to the governor nor to the legislature.[4] The Commissioner exercises power to choose and pay to GDOT employees without regard to state pay scales or state government constraints.[5] The Commissioner exercises the power of eminent domain free from supervision by the executive or legislative branches of the State.[6] GDOT has the authority to sue and be sued in its own name.[7] GDOT has the authority to acquire, hold and dispose of property in its own name.[8]

Assembly shall provide by law the procedure for the election of members and for filling vacancies on the board. Members shall serve for terms of five years and until their successors are elected and qualified.

(b) The State Transportation Board shall select a commissioner of transportation, who shall be the chief executive officer of the Department of Transportation and who shall have such powers and duties as provided by law.

[3] The Georgia Constitution classifies the Transportation Board among "Constitutional Boards and Commissions," independent agencies outside the ambit of direct execution or legislative control. Ga. Const. art. 4.

[4] O.C.G.A. § 32-2-41(a).

[5] O.C.G.A. § 32-2-41(b)(1).

[6] O.C.G.A. § 32-2-41(a).

[7] O.C.G.A. § 32-2-5.

[8] O.C.G.A. § 32-2-2(a)(8).

GDOT operates on funds earmarked by Georgia's Constitution for highway purposes and insulated by constitutional fiat from the legislative appropriations process or executive control.[9] These funds are under the exclusive control and supervision of GDOT.[10]

In 1981, GDOT took the tract of real property containing Gilbert Cemetery by power of eminent domain. In the process, GDOT took the easements of Mrs. Robinson and Mr. Glover. It offered them no compensation for the

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[9] Ga. Const. art. 3, § 9, ¶6(b) is reprinted in full in Appendix VI. It provides in pertinent part:

(b) An amount equal to all money derived from motor fuel taxes received by the state . . . is hereby appropriated for the fiscal year beginning July 1, of each year following, for all activities incident to providing and maintaining an adequate system of public roads and bridges in this state, as authorized by laws enacted by the General Assembly of Georgia, and for grants to counties by law authorizing road construction and maintenance, as provided by law authorizing such grants. Said sum is hereby appropriated for, and shall be available for, the aforesaid purposes regardless of whether the General Assembly enacts a general appropriations Act; and said sum need not be specifically stated in any general appropriations Act passed by the General Assembly in order to be available for such purposes. . . . The expenditure of such funds shall be subject to all the rules, regulations, and restrictions imposed on the expenditure of appropriations by provisions of the Constitution and laws of this state, unless such provisions are in conflict with the provisions of this paragraph. . . . [T]he proceeds of the tax hereby appropriated shall not be subject to budgetary reduction. In the event of invasion of this state by land, sea, or air or in case of a major catastrophe so proclaimed by the Governor, said funds may be utilized for defense or relief purposes on the executive order of the Governor.

[10] O.C.G.A. § 32-2-2(a)(2).

takings. To this day, GDOT has paid no compensation for these takings.

The real property records of Fulton County have disclosed the existence and location of Gilbert Cemetery since at least 1932. When GDOT began planning the project to expand I-75 into the tract containing Gilbert Cemetery in the late 1970's, it discovered the Cemetery's existence and its implications. Appendix V, an internal GDOT memo dated October 19, 1978, contains a lawyer's title opinion on the tract stating, in pertinent part:

> the title and rights acquired by [a condemnor] will necessarily be subject to rights of burial easement in and to that portion of property acquired, with the rights of ingress and egress to and from the graves of the parties buried therein by the relatives of said parties. The public records do not disclose the names of persons buried in this cemetery, and we are not informed as to whether or not the graves are sufficiently marked to identify the people therein. Field investigation will be necessary, therefore, to determine the names of the unknown heirs-at-law, who would be necessary parties to any condemnation proceedings. . . .

On November 14, 1978, GDOT conducted a public environmental impact hearing on the highway expansion project. At this hearing, Rev. John V. Sorrow testified:

> There is a cemetery at Cleveland Avenue and I-75 North, and it has been covered over. It was black people in times past, I think. They have covered over to where you don't know it, but there is some graves still there.

On March 26, 1981, GDOT ignored the Cemetery and the rights of burial easement owners when it filed a

condemnation petition to take the Gilbert Cemetery tract. The petition did not disclose the fact that Gilbert Cemetery lay in the path of the highway expansion. GDOT did not name any burial easement owner as a condemnee. GDOT made no effort to identify or to serve these condemnees with process in its condemnation action. These omissions, each of which violates Georgia law governing GDOT's exercise of eminent domain power,[11] effectively excluded Mrs. Robinson and Mr. Glover from participation in the state court condemnation proceeding in which compensation owed to the owners of interests in the real property was fixed and paid.

Toward the end of 1981, GDOT construction crews began work on the highway expansion project at Gilbert Cemetery. Mrs. Robinson and Mr. Glover and other affected parties discovered the presence of GDOT bulldozers on their loved ones' graves and immediately objected. In response to these objections, GDOT notified the Fulton County Superior Court, for the first time, that Gilbert Cemetery lay in the path of the highway expansion.

These events triggered an equity proceeding in Fulton Superior Court balancing GDOT's interests in ongoing highway expansion with the aggregate interests of

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[11] Georgia requires condemnors to disclose in their condemnation petitions "[t]he property or interests to be taken or damaged," (O.C.G.A. § 32-3-5(a)(2)) "[d]escriptions of the persons or classes of unknown persons whose rights therein are to be excluded or otherwise affected," (O.C.G.A. § 32-3-5(a)(4)) and "[s]uch other facts as are necessary for a full understanding of the cause." O.C.G.A. § 32-3-5(a)(5).

burial easement owners. This equity proceeding resulted in a court-approved landscaping plan involving a blue granite statue of Jesus scrutinized by federal district court and modified on Establishment Clause grounds.[12]

GDOT's dispute over monetary compensation with other individual property owners holding interests in the tract containing Gilbert Cemetery proceeded to trial and jury verdict on June 1, 1983. Neither Mrs. Robinson nor Mr. Glover was ever joined as a party in that action. Neither was ever served with process by GDOT. Accordingly, burial easement owners, including Mrs. Robinson and Mr. Glover, did not participate in the Fulton Superior Court trial over compensation to individual property owners who suffered a taking.

2. The Decision of the District Court

In April 1984, Mrs. Robinson and Mr. Glover brought this action seeking enforcement of their federal constitutional right to compensation for the taking of their private property. On September 17, 1984, the trial court stayed this case to permit an exhaustion of state law remedies.

For six years, Mrs. Robinson and Mr. Glover pursued state law claims for the uncompensated taking in Georgia courts. Their efforts were unavailing.[13] Neither Mrs. Robinson nor Mr. Glover ever received a hearing on the

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[12] *Birdine v. Moreland*, 579 F.Supp. 412 (N.D. Ga. 1983).

[13] *Robinson v. Department of Transp. (Robinson I)*, 185 Ga. App. 597, 364 S.E.2d 884 (1988); *Robinson v. Department of Transp. (Robinson II)*, 195 Ga. App. 594, 394 S.E.2d 590 (1990).

merits of their claims to compensation in the courts of Georgia. Neither property owner has ever been paid one penny of compensation.

On August 3, 1990, Mrs. Robinson and Mr. Glover returned to federal district court and moved to lift the stay on this action. Over GDOT's opposition, the trial court granted this request.[14] Then, on July 11, 1991, on the motion of GDOT, the trial court dismissed this action on the theory that Eleventh Amendment immunity barred suit.[15]

3. The Decision of the Court of Appeals

On July 20, 1992, an Eleventh Circuit panel issued its decision affirming dismissal on Eleventh Amendment grounds. Bound by *Hans v. Louisiana* and its progeny extending Eleventh Amendment immunity to suits by citizens against their home states, the panel examined GDOT's "function and character as determined by state law." The panel concluded that, despite Georgia's constitutional scheme segregating GDOT's funds from the general treasury of Georgia, motor fuel taxes are "state funds" which render GDOT "dependent on the State for its funds." 966 F.2d at 640. The panel opinion was silent on the Eleventh Amendment implications of GDOT's autonomy from control by either the executive or the legislative branch of Georgia government.

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[14] The trial court's order of January 3, 1991 lifting the stay is attached as Appendix IV.

[15] Appendix III.

REASONS FOR GRANTING THE WRIT

I. The Constitutional Issue Is Important.

The plain language of the Eleventh Amendment presents no barrier to suits by Georgia citizens to vindicate their federal constitutional against their home state. There is no threat to Georgia sovereignty comparable to that perceived from *Chisholm v. Georgia*, 2 Dall. 419, 1 L.Ed. 440 (1793), in haling the state before a jury of *its* citizens empanelled by a federal court sitting in Georgia. The barrier arises, instead, from an elastic, extra-textual reading of the Eleventh Amendment originating with *Hans v. Louisiana*, 134 U.S. 1 (1890). The struggle to define the contours of this nebulous expansion of Eleventh Amendment immunity has created a far more severe burden on the federal judiciary – and far less predictability in applying Eleventh Amendment limits on federal jurisdiction – than *Hans* and its progeny ever resolved.

The members of this Court have written eloquently on the problems created by *Hans*.[16] The commentators

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[16] In 1981, Justice Stevens concurred in *Florida Dept. of Health & Rehab. Servs. v. Florida Nursing Home Ass'n.*, 450 U.S. 147, 151-55 (1981). He wrote at that time that "the adverse consequences of adhering to an arguably erroneous precedent [flowing from *Hans v. Louisiana*] are far less serious than the consequences of further unravelling the doctrine of *stare decisis*." 450 U.S. at 155. Four years later, Justice Stevens opined:

> [T]he Court has not felt constrained by *stare decisis* in its expansion of the protective mantle of sovereign immunity . . . and additional study has made it abundantly clear that not only *Edelman*, but *Hans v. Louisiana*, 134 U.S. 1 (1890), as well, can properly be characterized as 'egregiously incorrect.' 450 U.S. at

agree.[17] This case presents the Court with an appropriate opportunity to rectify forthrightly the muddle created by

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> 153. I am now persuaded that a fresh examination of the Court's Eleventh Amendment jurisprudence will produce benefits that far outweigh 'the consequences of further unravelling the doctrine of stare decisis' in this area of the law.

Atascadero State Hospital v. Scanlon, 473 U.S. 234, 304 (1985) (Stevens, J. dissenting).

Justice Stevens has hardly been alone on the Court in criticizing the Eleventh Amendment jurisprudence arising from *Hans v. Louisiana*. *E.g.*, *Atascadero State Hospital v. Scanlon*, 473 U.S. at 301-02 (Brennan, J., dissenting) (*Hans* "rested on misconceived history and misguided logic"; "[t]he doctrine that has thus been created is pernicious."); *Papasan v. Allain*, 478 U.S. 265, 293 (1986) (Blackmun, J., concurring in part and dissenting in part) ("Petitioners claim that [the State defendant] breached legal obligations placed on it by federal law. I agree with Justice Brennan that the Eleventh Amendment was never intended to bar such suits."); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 44-45 (1989) (Scalia, J., concurring in part, dissenting in part) ("[I]nstead of cleaning up the allegedly muddled Eleventh Amendment jurisprudence produced by *Hans*, the Court leaves that in place, and adds to the clutter the astounding principle that Article III limitations can be overcome by simply exercising Article I powers."); 491 U.S. at 57 (O'Connor, J., dissenting) ("a faithful interpretation of the Eleventh Amendment embodies a concept of state sovereignty which limits the power of Congress to abrogate States' immunity when acting pursuant to the Commerce Clause. But that view does not command a majority of the Court.").

[17] *See* Fletcher, *A Historical Interpretation Of The Eleventh Amendment: A Narrow Construction Of An Affirmative Grant Of Jurisdiction Rather Than A Prohibition Against Jurisdiction*, 35 Stan. L. Rev. 1033 (1983); Gibbons, *The Eleventh Amendment And State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889 (1983); Amar, *Of Sovereignty And Federalism*, 96 Yale L.J. 1425 (1987); Nowack, *The Scope Of Congressional Power To Create*

Hans. Petitioners urge the Court to seize this opportunity to correct an "egregiously incorrect" decision that has diverted federal judicial resources from the merits resolution of disputes to chronic tinkering over the parameters of a doctrine lacking textual support in the Eleventh Amendment.

II. The Court of Appeals' Decision Conflicts in Principle with the Fifth Circuit's Application of Eleventh Amendment Doctrine to State-Created Entities with Fiscal Independence.

In GDOT, Georgia has created a fiscally independent, politically autonomous public creature with the awesome power of eminent domain. GDOT is not accountable to the legislative branch of Georgia government. GDOT is not accountable to the governor or to the executive branch of state government. GDOT operates on a constitutionally-earmarked stream of revenue insulated from legislative or executive control. Its money is segregated from the general operating funds of the State of Georgia. Yet GDOT, according to the decision below, is an arm of the State for Eleventh Amendment purposes.

This erroneous determination conflicts in principle with *McDonald v. Board of Mississippi Levee Comm'rs*, 832 F.2d 901 (5th Cir. 1987). In *McDonald*, the Fifth Circuit considered and rejected Eleventh Amendment immunity

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Causes Of Action Against State Governments And The History Of The Eleventh And Fourteenth Amendments, 75 Colum. L. Rev. 1413 (1975); Tribe, *Intergovernmental Immunities In Litigation, Taxation, And Regulation: Separation Of Powers Issues And Controversies About Federalism*, 89 Harv. L. Rev. 682 (1976).

for Mississippi's Board of Levee Commissioners. Like Georgia's Transportation Board, Mississippi's Board is created and removed from the legislature's control by state constitutional mandate.[18] Like GDOT, the Mississippi Levee Board has the capacity to satisfy judgments from funds segregated from the state treasury, although the source of funds is an acreage tax fixed and collected by the Board under authority granted by legislative enactment.[19] Like GDOT, the Mississippi Levee Board enjoys power to sue and be sued and to hold and use property in its own name.[20] Like GDOT, the Mississippi Levee Board is not under supervisory control of any state official, although the Levee Board (unlike GDOT) operates under a state constitutional mandate to submit annual reports to the governor.

Distinctions between GDOT and the Mississippi Levee Board can certainly be drawn, but the conflict in principle between the Fifth Circuit's decision in *McDonald* and the Eleventh Circuit's decision here presents a need for exercise of this Court's supervisory powers over this fundamental question of federal court jurisdiction. If the Court is not inclined to tackle directly the mischief of *Hans*, it should at least provide guidance to those who must reconcile *McDonald* with the result here.

[18] 832 F.2d at 906.

[19] *Id.*

[20] 832 F.2d at 908.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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October 19, 1992

APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 91-8731

D.C. Docket No. 1:84-cv-768-MHS

HATTIE E. ROBINSON,
LAMAR GLOVER,

Plaintiffs-Appellants,

versus

GEORGIA DEPARTMENT OF TRANSPORTATION,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

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(Filed July 20, 1992)

Before TJOFLAT, Chief Judge, ANDERSON, Circuit Judge, and MORGAN, Senior Circuit Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the District Court appealed from in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT plaintiffs-appellants pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: July 20, 1992
For the Court: Miguel J. Cortez, Clerk

By: David Maland
Deputy Clerk

ISSUED AS MANDATE: AUG 25 1992

APPENDIX II

Hattie E. ROBINSON, Lamar Glover,
Plaintiffs-Appellants,

v.

GEORGIA DEPARTMENT OF TRANSPORTATION,
Defendant-Appellee.

No. 91-8731.

United States Court of Appeals,
Eleventh Circuit.

July 20, 1992.

Appeal from the United States District Court for the Northern District of Georgia.

Before TJOFLAT, Chief Judge, ANDERSON, Circuit Judge, and MORGAN, Senior Circuit Judge.

ANDERSON, Circuit Judge:

INTRODUCTION

Appellants, Hattie E. Robinson and Lamar Glover (hereinafter referred to collectively as "appellants"), sought relief under 42 U.S.C. § 1983 against appellee, the Georgia Department of Transportation ("GDOT"), for inverse condemnation of property that was an ancestral cemetery. GDOT moved to dismiss on the ground that appellants' suit was barred under the Eleventh Amendment. The district court granted the motion, and this appeal ensued.

FACTS

In the late 1970's, GDOT began work on a project to expand I-75. Part of the land to be used for this project extended over an old burial site. Appellants are heirs-at-law of persons buried in the cemetery. Appellants brought suit under § 1983 for violation of the Fifth and Fourteenth Amendments for a taking of their property for public use without payment of compensation.

PROCEDURAL HISTORY

Appellants filed this action on April 18, 1984. GDOT answered on May 11, 1984. On September 17, 1984, the trial court stayed the federal proceedings pending proceedings in state court involving the property. *See Robinson v. Dep't of Transp.*, 185 Ga.App. 597, 364 S.E.2d 884 (1988) ("Robinson I"); *Robinson v. Dep't of Transp.*, 195 Ga.App. 594, 394 S.E.2d 590 (1990) ("Robinson II"). Following the disposition by the state court, appellants moved to lift the stay on August 3, 1990. On January 3, 1991, the district court lifted the stay and permitted appellants to supplement the complaint. On January 30, 1991, GDOT moved to dismiss. On July 11, 1991, the district court granted appellee's motion to dismiss. In its order, the district court dismissed because GDOT is immune under the Eleventh Amendment.

DISCUSSION

A. Eleventh Amendment Immunity

The Eleventh Amendment bars suit in federal court against a State. The immunity provided by the Eleventh

Amendment applies to States and state officials but not to municipal corporations, counties, or other political subdivisions of the State. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280, 97 S.Ct. 568, 572, 50 L.Ed.2d 471 (1977).

We must determine whether GDOT is an "arm of the State" for Eleventh Amendment purposes. In *Fouche v. Jekyll Island-State Park Auth.*, 713 F.2d 1518, 1520 (11th Cir.1983), this court stated:

> Whether [an entity] is an arm of the state protected by the Eleventh Amendment "turns on its function and character as determined by state law." *Sessions v. Rusk State Hospital*, 648 F.2d 1066, 1069 (5th Cir.1981). Factors that bear on this determination include the definition of "state" and "political subdivision," the state's degree of control over the entity, and the fiscal autonomy of the entity. See *Mt. Healthy, supra*, 429 U.S. at 280, 97 S.Ct. at 572; *United Carolina Bank v. Board of Regents*, 665 F.2d 553 (5th Cir.1982).

See also Harden v. Adams, 760 F.2d 1158, 1163 (11th Cir.), *cert. denied*, 474 U.S. 1007, 106 S.Ct. 530, 88 L.Ed.2d 462 (1985).

1. Definition of State and Political Subdivision

Although Georgia law does not define "State" and "political subdivision," *see Fouche*, 713 F.2d at 1520, some of the provisions of the Georgia code relating to GDOT are helpful in determining whether it enjoys Eleventh Amendment protection. For instance, O.C.G.A. § 32-2-2(a)(2) states that GDOT "shall be the state agency

to receive and shall have control and supervision of all funds appropriated for public road work." In addition, O.C.G.A. § 32-2-2(a)(7) states that "[t]he department shall be the proper agency of the state to discharge all duties imposed on the state by any act of Congress allotting federal funds to be expended for public road and other transportation purposes in this state."

GDOT cites *State Highway Dep't v. Parker*, 75 Ga.App. 237, 43 S.E.2d 172 (1947), for the proposition that GDOT is a state agency. The court in *Parker* stated the following:

> [T]he state highway department is a part of the sovereign state, an agent or servant of the state, and it can not be sued without the express consent of the sovereign. We think that there can be no doubt that the acts of the state highway department are the acts of the state of Georgia.

43 S.E.2d at 174. Appellants counter that the court in *Parker* likened the State Highway Department (the predecessor to GDOT) to a county. Therefore, appellants argue that if GDOT is like a county, it enjoys no Eleventh Amendment immunity. *See Mt. Healthy, supra*, 429 U.S. at 280, 97 S.Ct. at 572 (Eleventh Amendment immunity does not extend to counties). The analogy of GDOT to a county in *Parker*, however, is not dispositive. The *Parker* court, in comparing the state highway department to a county, was discussing the ability of the state highway department to be sued in the Georgia courts. The state highway department, like counties, can be sued in Georgia state courts only where the State has given its consent. Thus, the *Parker* court was not using the county comparison in order to reach the conclusion that the state highway department is a political subdivision like counties. In fact,

in *Huggins v. Georgia Dep't of Transp.*, 165 Ga.App. 178, 300 S.E.2d 195 (1983) (holding that GDOT, as a state agency, does not come within the ambit of statutory provision applying to municipal corporations, counties, or other political subdivisions of the State), the court expressly rejected the notion that GDOT is a county, a municipal corporation, or any other political subdivision of the State.

2. *State's Degree of Control and Fiscal Autonomy*

As this court stated in *Fouche*, "[t]he Eleventh Amendment protects the sovereignty of the state by prohibiting suits when recovery would be paid from state funds." 713 F.2d at 1521 (citing *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974)). In *Harden v. Adams*, 760 F.2d 1158, 1163 (11th Cir.1985), this court stated that "[w]here the budget of an entity is submitted to the state for approval, this suggests that the entity is an agency of the state." In this case, appellants argue that GDOT is financially independent from the State because the statute provides that GDOT "shall be the state agency to receive and shall have control and supervision of all funds appropriated for public road work by the state and activities incident thereto from the net proceeds of motor fuel tax as provided in Article III, Section IX, Paragraph VI(b) of the Constitution of Georgia and any other funds appropriated or provided for by law for such purposes." O.C.G.A. § 32-2-2(a)(2). Thus, appellants argue that GDOT receives the motor fuel tax as provided in the

Georgia Constitution without the intervention of the legislature and can spend the funds in its discretion without any legislative approval.

While GDOT appears to be fiscally autonomous from the state legislature in the sense that it can spend all the dedicated funds in its discretion, it does not appear from the statute that GDOT raises any funds on its own. In *Fouche,* this court discussed the ability of the Jekyll Island-State Park Authority to raise funds. The fact that the Park Authority could raise funds on its own cut against finding that it was an arm of the State. 713 F.2d at 1520. This factor is significant in this case. Because GDOT does not issue bonds or have any mechanism of raising its own revenues, it remains dependent on the State for its funds. This fact lends support for the conclusion that GDOT is an arm of the State.

In addition, in *Fouche,* despite the fact that the Park Authority had received no funds from the State for the period covering the claims at issue, the court concluded that because any judgment would be paid out of current state funds, the Eleventh Amendment protected the Park Authority. 713 F.2d at 1521. In this case, any recovery would be paid out of state funds because GDOT's source of revenue is from the motor fuel tax specified in the Georgia Constitution. The fact that GDOT can allocate its funds in its own discretion and without intervention by the state legislature does not change the fact that these funds are state funds.

For the foregoing reasons, we conclude that GDOT is an arm of the State.

B. Waiver of Eleventh Amendment Immunity

The Eleventh Amendment bars suits against a State for alleged deprivations of civil liberties unless the State has waived its immunity or "unless Congress has exercised its undoubted power under § 5 of the Fourteenth Amendment to override that immunity." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 2309, 105 L.Ed.2d 45 (1989); *see also Welch v. Texas Dep't of Highways and Public Transp.*, 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987) (plurality opinion). In *Quern v. Jordan*, 440 U.S. 332, 341, 99 S.Ct. 1139, 1145, 59 L.Ed.2d 358 (1979), the Court concluded that Congress, in passing § 1983, did not intend to override the immunity guaranteed to the States by the Eleventh Amendment. Thus, GDOT's Eleventh Amendment immunity has not been overridden by Congress.

We turn next to appellants' argument that Georgia has waived its immunity in this case. In *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 n. 1, 105 S.Ct. 3142, 3145 n. 1, 87 L.Ed.2d 171 (1985), the Supreme Court held that a State waives its Eleventh Amendment immunity only if there is "an unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment." Appellants argue that GDOT has waived sovereign immunity because it has consented to suit in state court. *See* O.C.G.A. § 32-2-5(a); Ga. Const., Art. I, Sec. 3, ¶ 1(a) ("private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid."). Appellee counters that the Georgia Constitution expressly reserves the State's immunity in

federal court[1] and that, in any event, a waiver in state court does not constitute a waiver in federal court. *See Atascadero*, 105 S.Ct. at 3146 ("Although a State's general waiver of sovereign immunity may subject it to suit in state court, it is not enough to waive the immunity guaranteed by the Eleventh Amendment."). Thus, it is clear in this case that the State has not waived its immunity.

CONCLUSION[2]

For the foregoing reasons, the Eleventh Amendment bars appellants' § 1983 claim against GDOT. Accordingly, the judgment of the district court is

AFFIRMED.[3]

---

[1] See Georgia Const. Art. I, Sec. 2, ¶ 9 which provides: Sovereign immunity extends to the state and all of its departments and agencies. . . . No waiver of sovereign immunity shall be construed as a waiver of any immunity provided to the state or its departments and agencies by the United States Constitution.

[2] The pending motions concerning supplemental briefs are granted. The supplemental briefs of both parties have been filed and considered.

[3] Appellants' other arguments on appeal have no merit and warrant no discussion.

APPENDIX III

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

HATTIE E. ROBINSON and LAMAR GLOVER,	:	
Plaintiffs	:	CIVIL ACTION
v.	:	1:84-CV-768-MHS
GEORGIA DEPARTMENT OF TRANSPORTATION,	:	
Defendant	:	

ORDER

Presently before the Court is defendant's motion to dismiss plaintiff's inverse condemnation claims. For the reasons stated below, the Court will grant defendant's motion.

Defendant Georgia Department of Transportation ("GDOT") moves to dismiss plaintiffs' complaint on the grounds that all claims asserted against it pursuant to 42 U.S.C. § 1983 are barred by sovereign immunity. GDOT argues that because it is undisputedly an agency of the State of Georgia, it is entitled to immunity under the Eleventh Amendment to the United States Constitution. Recent decisions by the United States Supreme Court compel the Court to agree with defendant's reasoning and dismiss the § 1983 claims.

In *Will v. Michigan Department of State Police*, 109 S.Ct. 2304 (1989), the Supreme Court held that neither a state

nor its officials are "persons" within the meaning of § 1983.

> Section 1983 provides a federal forum for many deprivations of civil liberties, but does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties. The Eleventh Amendment bars such suits unless the State has waived its immunity . . . or unless Congress has exercised its undoubted authority under § 5 of the Fourteenth Amendment to override that immunity.

Id. at 2309 (citations omitted). Plaintiff argues that coupled with the overriding effect of the just compensation clauses of the Fifth Amendment to the federal constitution and Georgia's corresponding state constitutional provision, Georgia's express acknowledgement of its responsibility for inverse condemnation claims supports a finding of waiver. Waiver of sovereign immunity in state court, however, does not constitute waiver of the bar in a federal forum. *See Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 241 (1985). Without express provision to the contrary by the State, the mere existence of the Fifth Amendment takings clause does not constitute a waiver of Georgia's Eleventh Amendment Immunity.[1] *Id.*

Accordingly, the Court GRANTS defendant's motion to dismiss plaintiff's § 1983 claims.

---

[1] Plaintiffs suggest that to the extent that the Court finds *Will* a bar to this case against GDOT, its was a narrow 5-4 decision and, "with all due respect, wrongly decided." The Court's possible agreement with plaintiffs' assessment of the limitation *Will* places on civil rights actions, however, does not empower the Court to ignore clearly established precedent.

IT IS SO ORDERED, this 10th day of July, 1991.

/s/ Marvin H. Shoob
Marvin H. Shoob, Judge
United States District Court
Northern District of Georgia

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Hattie E. Robinson and Lamar Glover,	:	JUDGMENT IN A CIVIL CASE
Plaintiff,	:	
V.	:	Case Number: 1:84-cv-768-MHS
Georgia Department of Transportation,	:	
Defendant,	:	

DECISION BY COURT. This action came for consideration before the Court. The issues have been considered and a decision has been rendered, having granted defendant's motion to dismiss,

IT IS ORDERED AND ADJUDGED that the plaintiffs, Hattie E. Robinson and Lamar Glover, take nothing, that the action be dismissed, and that the defendant, Georgia Department of Transportation, recover from the plaintiffs it's cost of action.

Date: July 11, 1991

LUTHER D. THOMAS, Clerk
/s/ Kevin Moeggenberg
Deputy Clerk

Filed and Entered
in the Clerk's Office
July 11, 1991
LUTHER D. THOMAS, Clerk

By: /s/ Kevin Moeggenberg
Deputy Clerk

APPENDIX IV

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

HATTIE E. ROBINSON and LAMAR GLOVER,	:	
Plaintiffs	:	CIVIL ACTION
v.	:	1:84-cv-768-MHS
GEORGIA DEPARTMENT OF TRANSPORTATION,	:	
Defendant	:	

ORDER

(Filed Jan. 3, 1991)

Presently before the Court is defendant's motion to lift the stay entered by this Court on September 17, 1984, and to supplement their complaint. Defendant contends that plaintiffs have failed to show good cause for the reopening of this action. While the road of this litigation has been long and arduous, plaintiffs are entitled to a resolution of their claims on the merits. The Court will not penalize plaintiffs, as defendant requests, for their inability to obtain relief in state court. Accordingly, the Court GRANTS plaintiffs' motion to lift the stay of this action and GRANTS plaintiffs' request to supplement their complaint.

IT IS SO ORDERED, this 3rd day of January, 1991.

/s/ Marvin H. Shoob
Marvin H. Shoob, Judge
United States District Court
Northern District of Georgia

DEPARTMENT OF TRANSPORTATION
STATE OF GEORGIA

INTERDEPARTMENT CORRESPONDENCE

FILE I-75-2(51) Fulton
I-75-2(58) Clayton

OFFICE Location

DATE October 19, 1978

FROM James D. Mathis

TO FILES

SUBJECT Possible Cemetery Site

Following circulation for review of the Draft Environmental Impact Statement for the subject project, it has been brought to the attention of this office that a portion of property to be acquired for right-of-way may have been used in the past as a cemetery.

The site of this possible graveyard is located in the northwest corner of Cleveland Avenue and Forest Hills Drive, adjacent to the interchange of I-75 with Cleveland Avenue. The property is situated between the Old South Liquor Store on Cleveland Avenue and the Old South Motel on Forest Hills Drive (see attached aerial photo).

It has been reported that this plot of land -- which is unmarked and contains no headstones -- was used in the past as a "slave cemetery," and preliminary research indicates that the property was set aside as a cemetery between the years 1861 and 1944, its size being listed as 250 feet by 160 feet (see attached letter from Atlanta Title Company).

Additional investigation should be carried out to determine the accuracy of the above information and what ramifications, if any, it will have on the current I-75 improvements project.

/jdm

ATLANTA TITLE CO.

JOHNSON ATLANTA TITLE & TRUST CO.

PRYOR STREET AT AUBURN AVENUE

TITLE BUILDING

Atlanta 3, Georgia

May 18, 1949

W. S. Northcutt
County Attorney
Atlanta, Georgia

App. 18

ATTENTION: Mr. Clifford Hendrix, Special Assistant County Attorney

RE: Unit One of South Leg of Expressway
Atlanta Title No. 144,151

Gentlemen:

The Atlanta Title Company, pursuant to your request, has caused a thorough search to be made of the title of the property described herein, and now furnishes to you, for use in proceedings for the condemnation of said property, the following information with reference to said title:

The title is vested of record in Annie B. Gilbert, Mrs. Kate Johnson Gilbert, Miss Katheryne Y. Gilbert, Mrs. Gartine G. Avary, Mrs. Gussie G. Taylor as Executrix under the Last Will and Testament of Mrs. Hattie C. Moore, and Mrs. Gussie G. Taylor as Executrix of the estate of Hugh W. Gilbert, Mrs. Gussie G. Taylor, individually, William L. Gilbert, individually, and William L. Gilbert as executor of the estate of Jerimah S. Gilbert.

Title to this property was originally vested in J. S. Gilbert by deed from William Gilbert, dated January 7, 1861, and recorded in Deed Book "I", page 510, Fulton County Records. Sometime subsequent to the year 1861 and prior to the year 1944, there was created a cemetery out of the original property of the said J. S. Gilbert. In February 1944, the above named parties, with the exception of Mrs. Hattie C. Moore, who was then in life, conveyed certain property to J. B. Alexander. The conveyance of this property to Alexander included within the metes and bounds description in said deed, the subject property, and followed the description with an exception as follows: "Excepted from the above description is a one (1) acre square tract located in the Northwest corner of Cleveland Avenue and South Pryor Road, which, according to plat recorded in Plat Book 16, page 29, is reserved for cemetery". The plat thus referred to is a subdivision of the J. S. Gilbert estate made by E. W. Robert, County Surveyor, in March 1932. This plat does not disclose the dimensions of the one acre subdivision, but indicates this cemetery by a dotted line extending from the center line of South Pryor Road Extension Westwardly, and from the center line of Cleveland Avenue Northwardly, so as to form a one acre square. Subsequent plat of this subdivision of the Alexander

Titles insured by
Lawyers Title
Insurance Corporation

property prepared by J. W. Steed, C.E., in December 1945, indicates that the cemetery property has a frontage on the North side of Cleveland Avenue of 250 feet, and a frontage on South Pryor Road of 160 feet; the North line being indicated on said plat as 249 feet in length, and the West line being indicated on said plat as being a depth of 160 feet.

Plats furnished by the State Highway Department with the purpose of acquiring the title to this portion of the Expressway, indicate that the portion to be acquired is a square tract of land fronting 20 feet on the North side of Cleveland Avenue and 20 feet on the West side of South Pryor Road, and having a dimension on the North and West sides of 20 feet each.

We are unable to find any formal dedication or deed of record describing this cemetery property. A careful search of the public records indicates that the underlying fee in and to the entire cemetery property is vested in the individuals and parties named hereinabove, and the title and rights acquired by Fulton County will necessarily be subject to rights of burial easement in and to that portion of the property acquired, with the rights of ingress and egress to and from the graves of the parties buried therein by the relatives of said parties. The public records do not disclose the names of persons buried in this cemetery, and we are not informed as to whether or not the graves are sufficiently marked to identify the people therein. Field investigation will be necessary, therefore, to determine the names of the unknown heirs-at-law, who would be necessary parties to any condemnation proceedings filed against this tract of land.

We do not find that any taxes have been returned or paid on this property, and it is apparent that the Taxing Authorities are of the opinion that this property is not subject to taxation.

Very truly yours,

ATLANTA TITLE COMPANY

By _____
C. M. Valentine, Title Officer

586:pt

App. 19

APPENDIX VI

Ga. Const. art. 3, § 9, ¶ 6(b)

An amount equal to all money derived from motor fuel taxes received by the state in each of the immediately preceding fiscal years, less the amount of refunds, rebates, and collection costs authorized by law, is hereby appropriated for the fiscal year beginning July 1, of each year following, for all activities incident to providing and maintaining an adequate system of public roads and bridges in this state, as authorized by laws enacted by the General Assembly of Georgia, and for grants to counties by law authorizing road construction and maintenance, as provided by law authorizing such grants. Said sum is hereby appropriated for, and shall be available for, the aforesaid purposes regardless of whether the General Assembly enacts a general appropriations Act; and said sum need not be specifically stated in any general appropriations Act passed by the General Assembly in order to be available for such purposes. However, this shall not preclude the General Assembly from appropriating for such purposes an amount greater than the sum specified above for such purposes. The expenditure of such funds shall be subject to all the rules, regulations, and restrictions imposed on the expenditure of appropriations by provisions of the Constitution and laws of this state, unless such provisions are in conflict with the provisions of this paragraph. And provided, however, that the proceeds of the tax hereby

appropriated shall not be subject to budgetary reduction. In the event of invasion of this state by land, sea, or air or in case of a major catastrophe so proclaimed by the Governor, said funds may be utilized for defense or relief purposes on the executive order of the Governor.

Ga. Const. art. 4, § 4, ¶ 1

(a) There shall be a State Transportation Board composed of as many members as there are congressional districts in the state. The member of the board from each congressional district shall be elected by a majority vote of the members of the House of Representatives and Senate whose respective districts are embraced or partly embraced within such congressional district meeting in caucus. The members of the board in office on June 30, 1983, shall serve out the remainder of their respective terms. The General Assembly shall provide by law the procedure for the election of members and for filling vacancies on the board. Members shall serve for terms of five years and until their successors are elected and qualified.

(b) The State Transportation Board shall select a commissioner of transportation, who shall be the chief executive officer of the Department of Transportation and who shall have such powers and duties as provided by law.

O.C.G.A. § 32-2-2. Powers and duties of department generally.

(a) The powers and duties of the department, unless otherwise expressly limited by law, shall include but not be limited to the following:

(1) The department shall plan, designate, improve, manage, control, construct, and maintain a state highway system and shall have control of and responsibility for all construction, maintenance, or any other work upon the state highway system and all other work which may be designated to be done by the department by this title or any other law. However, on those portions of the state highway system lying within the corporate limits of any municipality, the department shall be required to provide only substantial maintenance activities and operations, including but not limited to reconstruction and major resurfacing, reconstruction of bridges, erection and maintenance of official department signs, painting of striping and pavement delineators, furnishing of guardrails and bridge rails, and other major maintenance activities; and, furthermore, the department may by contract authorize and require any rapid transit authority created by the General Assembly to plan, design, and construct, at no cost to the department and subject to the department's review and approval of design and construction, segments of the state highway system necessary to replace those portions of the system which the rapid transit authority and the department agree must be relocated in order to avoid conflicts

between the rapid transit authority's facilities and the state highway system;

(2) Except for appropriations to authorize the issuance of general obligation debt for public road work, or to pay such debt, the department shall be the state agency to receive and shall have control and supervision of all funds appropriated for public road work by the state and activities incident thereto from the net proceeds of motor fuel tax, as provided in Article III, Section IX, Paragraph VI(b) of the Constitution of Georgia and any other funds appropriated or provided for by law for such purposes or for performing other functions of the department. If the General Assembly fails to appropriate all of the net proceeds of the motor fuel tax to the department, to the State of Georgia General Obligation Debt Sinking Fund, and to counties for public road work and activities incident thereto, any such unappropriated part of such funds, exclusive of those proceeds required by law to be provided as grants to counties for the construction and maintenance of county roads, shall be made available to the department by the director of the Fiscal Division of the Department of Administrative Services, notwithstanding any provisions to the contrary in Part 1 of Article 4 of Chapter 12 of Title 45, the "Budget Act";

(3) The department shall provide for surveys, plans, maps, specifications, and other things necessary in designating,

supervising, locating, abandoning, relocating, improving, constructing, or maintaining the state highway system or any part thereof, or any activities incident thereto, or in doing such other work on public roads as the department may be given responsibility for or control of by law;

(4) The department shall reimburse the Department of Law for expenses incurred when the Attorney General of Georgia assigns any assistant attorney general or any deputy assistant attorney general to perform specific legal services in connection with the validation of any bonds as authorized by Code Section 45-15-16 or in connection with contract lawsuits and the acquisition of rights of way for any project on the state highway system constructed or to be constructed by the department and when such services are designated by the Attorney General to include specific items of legal services involving the trial or preparation for trial of individual condemnation cases, contract lawsuits, and related matters on such project or projects, or a group or series of condemnation cases, contract lawsuits and related matters in connection with a specific project or projects; provided, however, that no such reimbursement shall be made until the Attorney General has submitted a statement of the expenses of such legal services to the department, which statement shall include the name of the assistant attorney general performing such services, the items of legal services performed and the cost thereof, and, further, that no reimbursement shall be made for the

expenses of legal services for contract lawsuits unless such services had the advance approval of the commissioner;

(5) The department shall have the authority to negotiate, let, and enter into contracts with the Georgia Highway Authority, the State Tollway Authority, any person, any state agency, or any county or municipality of the state for the construction or maintenance of any public road or any other mode of transportation or for the benefit of or pertaining to the department or its employees in such manner and subject to such express limitations as may be provided by law;

(6) The department shall have the authority to negotiate and enter into reciprocal agreements and contracts with other states or agencies or subdivisions thereof concerning public roads and other modes of transportation and activities incident thereto;

(7) The department shall be the proper agency of the state to discharge all duties imposed on the state by any act of Congress allotting federal funds to be expended for public road and other transportation purposes in this state. The department shall have the authority to accept and use federal funds; to enter into any contracts or agreements with the United States or its agencies or subdivisions relating to the planning, financing, construction, improvement, operation, and maintenance of any public road or other mode or system of transportation; and to do all things necessary, proper, or

expedient to achieve compliance with the provisions and requirements of all applicable federal-aid acts and programs. Nothing in this title is intended to conflict with any federal law; and, in case of such conflict, such portion as may be in conflict with such federal law is declared of no effect to the extent of the conflict;

(8) The department shall have the authority to exercise the right and power of eminent domain and to purchase, exchange, sell, lease, or otherwise acquire or dispose of any property or any rights or interests therein for public road and other transportation purposes or for any activities incident thereto, subject to such express limitations as are provided by law;

(9) The department and its authorized agents and employees shall have the authority to enter upon any lands in the state for the purpose of making such surveys, soundings, drillings, and examinations as the department may deem necessary or desirable to accomplish the purposes of this title; and such entry shall not be deemed a trespass, nor shall it be deemed an entry which would constitute a taking in a condemnation proceeding, provided that reasonable notice is given the owner or occupant of the property to be entered and that such entry shall be done in a reasonable manner with as little inconvenience as possible to the owner or occupant of the property.

(10) In locating, relocating, constructing, improving, or maintaining any road on

the state highway system, the department shall have the authority to control or limit access thereto, including the authority to close off or regulate access from any part of any public road on a county road system or municipal street system to the extent necessary in the public interest;

(11) The department shall have the authority to construct and to perform substantial maintenance of public roads within the boundaries of state parks and on main access roads leading into such parks;

(12) (A) The department shall have the authority to formulate, promulgate, and enforce rules and regulations setting minimum safety standards for bridges on federal-aid public roads and to inspect and close any bridge on any such public road which does not comply with the minimum standards set by the department and which the department determines is unsafe for public travel. No new bridge shall be constructed on any such public road without there first having been obtained a permit for its construction from the department, such permit to be issued only where the proposed bridge will meet the minimum standards set by the department.

(B) The department may inspect and determine the maximum load, weight, and other vehicular dimensions which can be safely transported over each bridge on the state highway system and may post on each such bridge a legible notice showing such maximum safe limits. It shall be unlawful for any person to haul, drive, or

bring onto any bridge any vehicle, load, or weight which in any manner exceeds the maximum limits so ascertained and posted on such bridge;

(13) The department shall have the authority to establish, maintain, and operate ferries as part of a public road and to authorize and issue permits for any state agency, any county or municipality, or any private person to establish, maintain, and operate ferries as part of a public road whenever, in the discretion of the department, such ferries are reasonably necessary and in the best interest of the public. All such ferries shall be operated subject to such rules and regulations as the department may adopt to protect the public interest, and the authorization of any such ferry may be revoked whenever, in the discretion of the department, its continued operation is no longer necessary or in the best interest of the public;

(14) The department shall have those duties and powers in regard to programs relating to the Metropolitan Atlanta Rapid Transit Authority established by subsection (i) of Section 8 of an Act approved March 10, 1965 (Ga.L. 1965, p. 2243), particularly as amended by Section 5 of an Act approved March 16, 1971 (Ga.L. 1971, p. 2092);

(15) The department shall have the authority and duty relating to the inspection for violations of motor vehicle licensing and fuel tax registration requirements and the department shall report violations of

said requirements to the revenue commissioner;

(16) (A) All state aircraft required for the proper conduct of the business of the several administrative departments, boards, bureaus, commissions, authorities, offices or other agencies of Georgia and authorized agents of the General Assembly, or either branch thereof, and department owned airfields and their appurtenances shall be managed and maintained by the department. The cost for the use of such state aircraft shall be charged by the department to the using agency. The amount of such charge shall be determined by the department. The department shall be authorized to dispose of any state aircraft and apply the proceeds derived therefrom to the purchase of replacement aircraft when the director of the Office of Planning and Budget shall authorize such actions, notwithstanding any other provisions of law to the contrary.

(B) The department shall have all those powers and duties formerly set forth in Code Section 50-19-23, which statute relates to the maintenance and operation of state aircraft, supervision of their pilots, and similar matters.

(C) No department, board, bureau, commission, authority, office, or other agency of Georgia shall be authorized to expend state funds to purchase, lease, rent, charter, maintain, or repair state aircraft to be used in connection with state

business or to employ a person whose official duties consist of piloting state aircraft except the Department of Transportation.

(D) The Department of Administrative Services shall purchase all aircraft for the department in the same manner as other state purchases.

(E) Anything in this title to the contrary notwithstanding, the State Forestry Commission, the Department of Natural Resources, and the Department of Public Safety may, with the approval of the commissioner of transportation, expend state funds to purchase, lease, rent, charter, maintain, or repair special purpose aircraft necessary to conduct the particular business of said agencies and may employ persons whose official duties consist of piloting said aircraft;

(17) (A) Subject to general appropriations for such purposes, the department is authorized to plan for and establish a long-term policy in regard to the establishment, development, and maintenance of aviation and aviation facilities in the state; to promote and encourage the use of aviation facilities of the state for air commerce in the state, between the state and other states, and between the state and foreign countries; to cooperate with, counsel, and advise political subdivisions of the state and other departments, boards, bureaus, commissions, agencies, or establishments whether federal, state, local, public, or private for the purpose of promoting and obtaining coordination in the planning for

and in the establishment, development, construction, maintenance, and protection of a system of air routes, airports, landing fields, and other aviation facilities in the state.

(B) Subject to general appropriations for such purposes, the department is authorized to construct or to contract with any state agency, political subdivision, authority, or person for the construction of airports and of facilities and appurtenances incident to their operation. The authority and limitations of Article 4 of this chapter pertaining to department contracts and subcontracts for construction of public roads shall likewise apply to such airport construction contracts; provided, however, that such a contract when negotiated with a political subdivision shall not be subject to the limitation of subparagraph (d)(1)(A) of Code Section 32-2-61 pertaining to the average bid price for the 60 day period preceding the making of the contract. Article 1 of Chapter 3 and Chapter 7 of this title shall apply to the acquisition or disposition of land or interests therein for such airport construction.

(C) Subject to general appropriations for such purposes, the department is authorized to establish air markers at appropriate locations throughout the state to facilitate air navigation within the state. Said markers shall consist of painting on appropriately located roofs of buildings the names of towns or cities within which such buildings are located, such names to be painted in sufficient size to be legible under

good visibility conditions from a height of at least 3,000 feet. The department is authorized to obtain roof releases from the owners of buildings upon which air markers are to be painted or otherwise to obtain permission from such owners to use such roofs for such purposes and to pay the owners reasonable and nominal rentals therefore if such payment is necessary in order to obtain the appropriate permission for the use of such roofs for such purposes.

(D) Subject to general appropriations for such purposes, the department is authorized to maintain or to control for the maintenance of department owned or department leased airports, their facilities, and appurtenances incident to their operation. The authority and limitations of Article 4 of this chapter pertaining to contracts and subcontracts for maintenance of public roads shall likewise apply to such contracts for the maintenance of such department owned or department leased airports, provided that such a contract when negotiated with a political subdivision shall not be subject to the limitation of subparagraph (d)(1)(A) of Code Section 32-2-61 pertaining to the average bid price for the 60 day period preceding the making of the contract;

(18) (A) Subject to general appropriations and any provisions of Chapter 5 of this title to the contrary notwithstanding, the department is authorized within the limitations provided in subparagraph (B) of this paragraph to provide to municipalities,

counties, authorities, and state agencies financial support by contract for clearing, dredging, or maintaining free from obstructions and for the widening, deepening, and improvement of the ports, seaports, or harbors of this state. (B)(i) Municipalities, counties, authorities, or state agencies may, by formal resolution, apply to the department for financial assistance provided by this paragraph.

(ii) The department shall review the proposal and, if satisfied that the proposal is in accordance with the purposes of this paragraph, may enter into a contract for expenditure of funds.

(iii) The time of payment and any conditions concerning such funds shall be set forth in the contract.

(C) In addition to subparagraph (A) of this paragraph and subject to general appropriations for such purposes, the department with its own forces or by contract may clear, dredge, or maintain free from obstruction and may widen, deepen, and improve ports, seaports, or harbors of this state; and

(19) Code Sections 32-3-1 and 32-6-115 notwithstanding, the department may by contract grant to any rapid transit authority created by the General Assembly, under such terms and conditions as the department may deem appropriate, the right to occupy or traverse a portion of the right of way of any road on the state highway system by or with its mass transportation facilities. Furthermore, the department may by

contract lease to the rapid transit authority, under such terms and conditions as the department may deem appropriate, the right to occupy, operate, maintain, or traverse by or with its mass transportation facilities any parking facility constructed by the department. Notwithstanding Code Section 48-2-17, all net revenue derived from the lease shall be utilized by the department to offset the cost of constructing any parking facility. Regardless of any financial expenditures by the rapid transit authority, no right of use or lease granted under this paragraph shall merge into or become a property interest of the rapid transit authority. Upon the transfer of the title of the mass transportation facilities to private ownership or upon the operation of the rapid transportation facilities for the financial gain of private persons, such rights granted by the department shall automatically terminate and all rapid transportation facilities shall be removed from the rights of way of the state highway system.

(b) In addition to the powers specifically delegated to it in this title, the department shall have the authority to perform all acts which are necessary, proper, or incidental to the efficient operation and development of the department and of the state highway system and of other modes and systems of transportation; and this title shall be liberally construed to that end. Any power vested by law in the department but not implemented by specific provisions for the exercise thereof may be executed and

carried out by the department in a reasonable manner pursuant to such rules, regulations, and procedures as the department may adopt and subject to such limitations as may be provided by law.

O.C.G.A. § 32-2-41. Powers, duties, and authority of Commissioner.

(a) As the chief executive officer of the department, the commissioner shall have direct and full control of the department. He shall possess, exercise, and perform all the duties, powers, and authority which may be vested in the department by law, except those duties, powers, and authority which are expressly reserved by law to the board. When the board is not in regular or called session, the commissioner shall perform, exercise, and possess all duties, powers, and authority of the board except:

(1) Approval of the advertising of non-negotiated construction contracts;

(2) Approval of authority lease agreements;

(3) Confirmation or rejection of the recommendation for appointment of the following department officers: the deputy commissioner; the state highway engineer; the treasurer and the assistant treasurer of the department; and

(4) Approval of long-range plans and programs of the department.

The commissioner shall also have the authority to exercise the power of eminent domain and to

execute all contracts, authority lease agreements, and all other functions except those that cannot legally be delegated to him by the board.

(b) (1) The commissioner shall have the authority to employ, discharge, promote, supervise, and determine the compensation of such personnel as he may deem necessary or useful to the effective operation and administration of the department except that the commissioner shall not employ a person who is related within the second degree of consanguinity to the commissioner or any member of the board, provided that such prohibition shall not be applied so as to terminate the employment of persons employed before said prohibited relationship was created by the subsequent election of a board member or appointment of a commissioner. The commissioner shall also have the authority to create, staff, abolish, and regulate such organizational elements as may be deemed necessary or proper for the efficient operation of the department.

(2) The power granted to the commissioner in paragraph (1) of this subsection shall be subject to and limited by Article I of Chapter 20 of Title 45 establishing a merit system for department employees, to the extent that the same or any amendments thereto are now or may be hereafter applicable to department personnel.

O.C.G.A. § 32-2-5. Actions by or against department.

(a) The department shall have the authority to bring actions; and it may be sued in such actions as are permitted by law. In addition, the

department may adjust and make settlement of any and all claims presented to it under oath.

(b) All actions brought ex contractu by or against the department shall be brought in a county where any part of the work is to be or has been performed. All other actions by or against the department shall be brought in the county in which the cause of action arose. Service upon the department shall be sufficient by serving a second original process issued from the county where the action is filed upon the commissioner personally or by leaving a copy of the same in the office of the commissioner in the Department of Transportation Building, Atlanta, Georgia.

O.C.G.A. § 32-3-5. Contents of condemnation petition.

(a) The petition referred to in Code Section 32-3-4 shall set forth:

(1) The facts showing the right to condemn;

(2) The property or interests to be taken or damaged;

(3) The names and residences of the persons whose property or interests are to be taken or otherwise affected, so far as known;

(4) Descriptions of the persons or classes of unknown persons whose rights therein are to be excluded or otherwise affected;

(5) Such other facts as are necessary for a full understanding of the cause; and

(6) A prayer for the judgment of the court in accordance with Code Section 32-3-13 or 32-3-19.

(b) If any of the persons referred to in the petition are, so far as may be known, minors or under disability, that fact shall be stated.